

November 5, 2009

## UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker  
Clerk of Court

## FOR THE TENTH CIRCUIT

In re:

JOSE CASTRO-QUIRINO,

Movant.

No. 09-2256

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ORDER

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Before **MURPHY, EBEL, and HOLMES**, Circuit Judges.

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Movant Jose Castro-Quirino, a New Mexico state prisoner appearing pro se, has filed a motion for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus application seeking to assert ineffective assistance of counsel challenges to his state convictions. Because Mr. Castro-Quirino has previously presented his proposed claims, and because he does not now rely “on either a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence,” *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005) (citing 28 U.S.C. § 2244(b)), we deny authorization.

Mr. Castro-Quirino was found guilty in 2000, of bribery or intimidation of a witness, aggravated battery against a household member, and criminal sexual penetration in the third degree. He was sentenced to twenty-six years’ imprisonment. He filed his first § 2254 application challenging his convictions in

2003. He asserted three claims: “(1) he was denied the effective assistance of trial counsel, (2) his double jeopardy rights were violated, and (3) prosecutorial misconduct and numerous errors committed by the trial court deprived him of a fair trial.” *Castro-Quirino v. Blair*, 229 F. App’x. 801, 801-02 (10th Cir. 2007). The district court dismissed the § 2254 petition, ruling his claims were procedurally defaulted, and this court denied him a certificate of appealability. *Id.* at 802. He currently has a second § 2254 petition pending in the district court. *Castro-Quirino v. Wilson*, No. 09-cv-342 (D. N.M).

In his motion for authorization, Mr. Castro-Quirino seeks to assert the following ineffective assistance of counsel claims in his proposed second or successive § 2254 application: failure to question and call expert, alibi and character witnesses; failure to challenge the victims’ background; discovery and defense matters; failure to challenge the validity of police reports; insufficient case preparation; a non-strategic decision not to investigate; failure to listen to his version of the case; following improper procedures to secure the presence of witnesses; and failure to investigate impartial witnesses.

To obtain permission to file a second or successive § 2254 petition, Mr. Castro-Quirino must show that he has not raised his claims in a previous habeas application, 28 U.S.C. § 2244(b)(1), and that his new claims either “rel[y] on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” *id.* § 2244(b)(2)(A), or

depend[ ] on facts, “previously undiscoverable through the exercise of due diligence,” that “if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty,” *id.* § 2244(b)(2)(B).

We are prohibited from granting authorization in this case because Mr. Castro-Quirino’s proposed claims were presented previously in his 2003 petition. *See id.* § 2244(b)(1) (“A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.”). His 2003 petition alleged ineffective assistance of counsel based on “numerous failures,” including insufficient case preparation time; failure to consult with Mr. Castro-Quirino; failure to obtain expert witnesses; failure to investigate the case; failure to test or examine the evidence; failure to compel witnesses to appear; failure to object to the prosecutor’s questioning; failure to challenge a victim as unreliable based on her background; and failure to prepare jury instructions. *Castro-Quirino v. Blair*, No. 03-cv-753, § 2254 Application, Docket No. 1, at 6 (D. N.M June 25, 2003).

Accordingly, we DENY Mr. Castro-Quirino authorization to file his proposed second or successive § 2254 application. This denial of authorization is

not appealable and “shall not be the subject of a petition for rehearing or for a writ of certiorari.” 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court,

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal flourish.

ELISABETH A. SHUMAKER, Clerk